No.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID E. FISCHER,
LANCE CORPORAL,
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the pay of active duty servicemembers suspected of violating the Uniform Code of Military Justice subject to forfeiture before they have been convicted by a duly constituted court-martial?

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IN THE SUPREME COURT OF THE UNITED STATES

Lance Corporal David E. Fischer, Petitioner,
v.
United States, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Lance Corporal David E. Fischer, United States Marine Corps, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The Court of Appeals' denial of Petitioner's petition for reconsideration is unpublished at 2005 C.A.A.F. LEXIS 1211 (C.A.A.F. 2005). App. A, *infra*, at 1a. The opinion of the Court of Appeals for the Armed Forces is published at 61 M.J. 415 (C.A.A.F. 2005). App. B, *infra*, at 2a. The opinion of the Navy-Marine Corps Court of Criminal Appeals is published at 60 M.J. 650 (N-M. Ct. Crim. App. 2004). App. C, *infra* at 26a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on September

2, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution reads, in part:

> No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law....

STATUTORY PROVISIONS INVOLVED

10 U.S.C. § 813 states:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

10 U.S.C. § 857(a)(3) states:

> A forfeiture of pay and allowances shall be applicable to pay and allowances accruing on and after the date on which the sentence takes effect.

37 U.S.C. § 204(a)(1) states:

> The following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title—
> (1) a member of a uniformed service who is on active duty....

REGULATORY PROVISION INVOLVED

Department of Defense Financial Management Regulation volume 7A, chapter 3, subparagraph 010302.G.4. states:

> If a member is confined awaiting court-martial when the enlistment expires, pay and allowances end on the date the enlistment expires. If the member is acquitted when tried, pay and allowances accrue until discharge.

STATEMENT

At his general court-martial, Petitioner filed a motion for sentencing credit arguing that a Department of Defense Financial Management Regulation that terminated his pay and allowances forty-one days before his court-martial amounted to illegal pre-trial punishment prohibited by Article 13, Uniform Code of Military Justice, 10 U.S.C. § 813 (2000) and the Fifth Amendment to the Constitution. The military judge denied Petitioner's motion. In a 7-2 decision, the

Navy-Marine Corps Court of Criminal Appeals, sitting *en banc*, affirmed. In a 3-2 decision, the Court of Appeals for the Armed Forces affirmed the decision of the Navy-Marine Corps Court of Criminal Appeals. Petitioner petitioned the Court of Appeals for reconsideration. The Court of Appeals denied that petition on October 17, 2005.

A. A Service Member's Entitlement to Pay

In *Bell v. United States*, 366 U.S. 393, 401 (1961), this Court held that an active duty service member's entitlement to pay is dependent upon statutory right. All servicemembers on active duty in the armed forces are entitled to pay. 37 U.S.C. § 204(a)(1) (2000). In *Bell*, this Court noted that a service member who has not been punished at a court-martial "is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be." *Bell*, 366 U.S. at 401. This Court specifically rejected the argument by the United States that the plaintiffs in *Bell* were not entitled to pay and allowances because they were no longer performing their normal duties. *Bell*, 366, U.S. at 405, 408. "The rule has commanded unquestioned adherence throughout our history...." *Bell*, 366 at 405.

In 1951, the Comptroller General of the United States opined that active duty servicemembers, retained on active duty for trial by court-martial, were not entitled to pay unless they were ultimately acquitted of their suspected offenses. 30 Comp. Gen. 449 (1951). That opinion is the cited basis for Department of Defense Financial Management Regulation volume 7A, chapter 3, subparagraph 010302.G.3-4 (FMR). According to the FMR, once an active duty service member has reached his end of active obligated service (EAS), he is no longer entitled to pay unless he is in a "full duty-status."

Id. Confinement awaiting trial is not considered "full duty." *Id.* If a service member in pre-trial confinement is later acquitted of his suspected offenses, he is entitled to full pay and allowances until discharge. *Id.*

Petitioner was placed in pre-trial confinement on May 4, 2001. On June 29, 2001, Petitioner reached his EAS. He was convicted forty-one days later on August 9, 2001. During that forty-one-day-period, Petitioner received no pay or allowances.

B. Proceedings Below

The military judge held that the termination of Petitioner's pay was not punitive and was reasonably related to the legitimate government objective of ensuring "that individuals who are not performing normal work duties do not receive payment that is unearned and may later be difficult to recover."

The Navy-Marine Corps Court of Criminal Appeals agreed. "This regulation denies payment to those servicemembers who do not continue to serve in a **full duty** status and provide productive service in furtherance of the military mission...." *Fischer*, 60 M.J. at 653. Citing *Bell v. Wolfish*, 441 U.S. 520, 538-39 (1979), the Navy-Marine Corps Court of Criminal Appeals found the FMR related to a legitimate non-punitive government interest and affirmed the decision of the military judge.

Judges Villemez and Harris dissented. "To completely cut off one's statutory pay entitlement, due solely to being in pretrial confinement, after the individual's now-rendered-meaningless original EAS, serves no legitimate governmental objective." *Fischer*, 60 M.J at 659 (Villemez, J. dissenting). The FMR is "clearly pretrial punishment and a violation of

basic due process." *Id.* at 658. The dissent concluded, "the regulation must implode from the excess weight of its own illogicalness. While its intent may be admirable-saving the Government money-its effect is to impose an impermissible form of pretrial punishment or penalty on the Appellant...." *Id.* at 660.

A majority of the Court of Appeals for the Armed Forces affirmed. The Court of Appeals held that a service member's entitlement to pay ends at EAS – even though he remains on active duty. *Fischer*, 61 M.J. at 418. The Court of Appeals further held that only servicemembers who perform "productive work may be paid." *Id.* A service member held in confinement, and thus not performing useful duties, may be paid only if he is later acquitted by a court-martial. *Id.* The Court of Appeals found the FMR to be neither implicitly punitive nor punitive in effect. *Id.* at 421. The Court reasoned that the FMR furthered the legitimate government "interest in terminating the pay of persons who are not performing productive service." *Id.* at 421.

The Chief Judge and Judge Erdmann dissented. "One of the basic guarantees of the Due Process Clause is that a pretrial detainee cannot be punished until there is a finding of guilt." *Fischer*, 61 M.J. at 418 (Erdmann, J. dissenting). The dissent noted that court-martial jurisdiction, like military pay, is status based. Furthermore, Petitioner remained on active duty through disposition of the charges against him. *Id.* at 423. The dissent reasoned that the Court's opinion allows the government to "imprison a presumptively innocent individual, unilaterally continue military status with all its obligations and duties and at the same time take away on of the basic rights associated with active duty military status-the right to pay." *Id.* at 423. Because Petitioner's pay would not have been terminated except for his placement in pretrial

confinement, the FMR is obviously punitive. *Id.* at 424. "This regulation imposes a forfeiture upon a servicemember in the absence of any due process or adjudication of guilt." *Id.*

REASONS FOR GRANTING THE PETITION

The decision of the lower court is in direct conflict with this Court's decision in *Bell v. United States*, 366 U.S. 393 (1961). The lower court has applied common-law rules governing contracts to military pay. And it has sanctioned the forfeiture of military pay without Due Process and in violation of the Uniform Code of Military Justice. The decision also raises substantial questions about the nature military jurisdiction. Are servicemembers who are not entitled to pay or performing military duties still subject to trial by court-martial? This case presents a rare opportunity to address both the status-based nature of military pay and the Due Process protections afforded servicemembers with respect to it.

I.

The Court of Appeals' Decision that Military Pay is Conditioned Upon the Performance of Useful Military Duties and can be Forfeited Before a Service Member has been Convicted by a Court-Martial Conflicts with this Court's Decision in *Bell v. United States*, 366 U.S. 393 (1961).

Bell v. United States, 366 U.S. 393 (1961), involved three servicemembers who, after their capture by Chinese forces during the Korean War, became monitors for their captors at

their prison camp, wore Chinese military uniforms, and made propaganda broadcasts on behalf of the Chinese government. *Bell v. United States*, 149 Ct. Cl 248 (Ct. Cl. 1960). Private First Class Bell called President Harry Truman a war-monger and offered to run a tank over his body. *Id.* at 252. After they had refused repatriation, they were discharged from the Army on January 23, 1954. *Id.*

They then brought suit for pay until their discharge. The United States argued that they were not entitled to pay because they had breached their enlistment contract by not performing military duties. *Bell*, 366 U.S. at 401. This Court rejected the government's argument, upholding the well-settled principle that a service member's pay is "dependent upon statutory right." *Id.* "If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include forfeiture of future but not of accrued pay." *Id.*

In reaching its decision, this Court relied upon numerous court decisions and upon the opinions of the Attorneys General and Judge Advocates General. *Id.* These opinions uniformly held that servicemembers are entitled to receive the pay provided by statute, "unless he has forfeited it in accordance with the provisions of law, whether he has actually performed military service or not." 13 Op. Atty. Gen. 103, 104 (1869).

But in 1951, the Comptroller General responded to an opinion of the Judge Advocate General of the Army that held that the forfeiture of pay under the circumstances of this case constituted illegal pretrial punishment. 30 Comp. Gen. 449 (1951). The Comptroller opined that servicemembers in Petitioner's situation were no longer in a "full duty" status and were not entitled to pay unless they were acquitted of their suspected offenses at court-martial. *Id.*

The opinion of the Comptroller General was codified in the FMR. Recently, citing the FMR, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have declined to follow their previous decisions cited by this Court in *Bell*, and have held that servicemembers who do not perform useful and productive duties are not entitled to pay and allowances. *Simoy v. United States*, 64 Fed. Appx. 745, 746 (Fed. Cir. 2003); *Anderson v. United States*, 70 Fed. Appx. 572, 575 (Fed. Cir. 2003). The Federal Circuit has determined this to be a "settled rule of law." *Simoy*, 70 Fed. Appx. at 575. The Court of Appeals for the Armed Forces has adopted the holdings of these courts and applied their decisions to Petitioner's case. "Where Petitioner was not entitled to payment, nothing could have been forfeited." *Fischer*, 61 M.J. at 420.

The Comptroller General's opinion, issued ten years before *Bell*, should not have survived that decision. But it has and the Courts of Appeal for the Armed Forces and for the Federal Circuit have adopted the reasoning from that opinion that was expressly rejected by this Court in *Bell*. This Court should grant the petition because the lower court has decided a federal question in a way that conflicts with *Bell v. United States*.

II.

The Decision of the Court of Appeals is Erroneous

The Court of Appeals erroneously applied this Court's decisions in *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) in reaching its decision that the forfeiture of pay by active duty servicemembers does not constitute illegal pretrial

punishment.

Applying the test set out in *Bell v. Wolfish*, the Court of Appeals held that the forfeiture of Petitioner's pay was "reasonably related to the legitimate Government objective of not paying people who are not performing duties." *Fischer*, 61 M.J. at 420.

"This logic breaks down, however, because a servicemember who is later acquitted has performed the same duties while in pretrial confinement and receives compensation." *Fischer*, 61 M.J. at 424 (Erdmann J., dissenting). And the servicemember who is in pretrial confinement and has not reached his EAS, and who is performing the same "duties" as the post-EAS servicemember in the next cell, receives full pay and allowances. In fact, the only servicemembers who forfeit pay are those who are later convicted at court-martial. All other servicemembers are entitled to pay regardless of their EAS. "This is punishment." *Fischer*, 61 M.J. at 424 (Erdmann J., dissenting).

Even if the performance of useful duties is not a pretext for the intentional imposition of illegal pretrial punishment, an application of this Court's decision in *Kennedy* indicates that the FMR operates as punishment.

The Court of Appeals erroneously applied the seven factors set out by this Court in *Kennedy*. *Kennedy*, 372 U.S. at 168.

1. Affirmative Disability or Restraint

The FMR imposed an affirmative disability on Petitioner. While he was in confinement, his wife and seven-month-old son, no longer entitled to government quarters or Petitioner's housing allowances, were given what was essentially a one-day eviction notice by the government.

The Court of Appeals concedes that this "could be

viewed as a disability" but concluded that those in Petitioner's position "are not entitled to be paid." *Fischer*, 61 M.J. at 420. But active duty servicemembers are entitled to pay. 37 U.S.C. § 204(a)(1); *Bell*, 366 U.S. at 401. And it is well settled that, with regard to military compensation, the President may not diminish what Congress has given. *United States v. Symonds*, 120 U.S. 46 (1887); *United States v. Williamson*, 90 U.S. 411 (1874). To the extent that the FMR conflicts with 37 U.S.C. § 204(a)(1) and terminates the pay that Congress has authorized, it is a nullity. Petitioner was entitled to pay and the forfeiture of that pay constitutes an affirmative disability.

2. Historically Regarded as Punishment.

Forfeiture of pay has long been regarded as punishment and continues to be "the most frequent of all the military punishments." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 427-28 (2d ed. 1920). In *Robertson v. Baldwin*, this Court, while discussing the history of maritime law, noted that forfeitures, as a means of punishment, have existed since "the maritime law of the ancient Rhodians, which is supposed to antedate the birth of Christ by about 900 years." *Robertson v. Baldwin*, 165 U.S. 275 (1897).

In this country, forfeitures were established punishment by 1668 where the Colonial General Court of Massachusetts held that any mariner who departed his ship, "shall forfeit all his wages." *Robertson*, 165 U.S. at 287. The punitive nature and usage of forfeitures by masters and commanders in this country was perhaps best described by the District Court for Pennsylvania in 1806:

> The framers of maritime laws, knowing that seaman are, by the nature of their employment, subject to peculiar failings and

> vices, the offspring of unpolished manners and hardy, rude, and fearless habits, have calculated their codes for reformation, where practicable, and for punishment, where this cannot be effected. Heavy forfeitures, pecuniary mulcts, and corporal inflictions (many now obsolete and disused) are to be found in those laws, frequent and severe.

Watson v. The Rose, 1806 U.S. Dist. Lexis 1 (D.P.A. 1806). Forfeitures have always been considered and employed as punishment for mariners.

The Court of Appeals attempted to avoid the history of forfeitures as a means of punishment by simply insisting Petitioner's loss of pay and allowances was not forfeiture. "Where Petitioner was not entitled to payment, nothing could have been forfeited." *Fischer*, 61 M.J. at 420. But active duty servicemembers are entitled to pay until discharge or until they have been sentenced at court-martial. 37 U.S.C. § 204(a)(1); *Bell*, 366 U.S. at 401. Forfeiture is defined as the "[l]oss of some right or property as a penalty for some illegal act." BLACK'S LAW DICTIONARY 650 (6th Ed. 1990). The loss of Petitioner's pay can only be characterized as forfeiture. This has always been considered punishment for sailors.

3. Scienter.

The Court of Appeals correctly notes that consciousness of guilt is not a factor in determining whether to forfeit the pay of servicemembers in Petitioner's situation.

4. Retribution and Deterrence.

The FMR does promote the "traditional aims of punishment-retribution and deterrence." *Kennedy*, 372 U.S. at 168-69. In fact, it is difficult to imagine a better form of

retribution and deterrence than that provided for by the FMR. Not only was Petitioner held involuntarily held past his EAS, he was confined without pay while the government took ninety-seven days to bring him to court-martial for his guilty plea. While he was in confinement, his family was evicted from government quarters and denied Petitioner's housing allowance or any means to subsist.

The Court of Appeals held that the FMR is not aimed at those accused of criminal misconduct but only "applies if a neutral event occurs—the person's EAS date." *Fischer*, 61 M.J. at 421. But the FMR does not stop the pay of all servicemembers whose EAS passes. Only those who are ultimately convicted at a court-martial are not paid under the regulation. All other post-EAS servicemembers are paid.

5. Application to Criminal Behavior.

The FMR terminates that pay of servicemembers who are accused of a crime, past their EAS, in pretrial confinement, and who are ultimately convicted at a court-martial.

6. Alternative Purpose.

The Court of Appeals held that the FMR's purpose is not paying those who are not "providing productive service...." *Fischer*, 61 M.J. at 421. But the pay of servicemembers is status based and not determined by the performance of useful duties. *Bell*, 366 U.S. at 401. There can be no non-punitive purpose for denying pay and allowances to servicemembers who will later be convicted by a court-martial.

7. Excessiveness.

The Court of Appeals held that the termination of pay and allowances was not excessive. The Court compared Petitioner to civilian employees. "In civilian life, pretrial confinees may lose their jobs and are often not compensated for the time spent in pretrial confinement." *Fischer*, 61 M.J. at 421. Petitioner is not a civilian. The termination of his

pay and allowances was excessive.

The application of this Court's decisions in *Bell v. Wolfish* and *Kennedy v. Mendoza-Martinez* indicates the FMR punishes servicemembers before they have been convicted by a duly constituted court-martial. The Court of Appeals' misapprehension of controlling precedent calls for an exercise of this Court's power of supervision. This Court should grant the petition.

III.

This Issue is Important as the Court of Appeals has Sanctioned the Creation of a Class of Servicemembers who are not Paid as Servicemembers and who do not Perform Military Duties but Remain Subject to Court-Martial Jurisdiction.

With more than one million servicemembers currently on active duty, the issue of whether the pay of these servicemembers continues to be status based, and under what conditions they may lose their entitlement to pay, presents an important federal question. But the Court of Appeals' apparent rejection of the status-based nature of military pay also has tremendous implications for the status-based nature of court-martial jurisdiction.

The Constitution conditions the exercise of court-martial jurisdiction on one factor: the military status of the accused. *Solario v. United States*, 483 U.S. 435, 439 (1987). The test for this jurisdiction is whether a person can be regarded as falling within the term "land and naval forces." *Kinsella v. United States*, 361 U.S. 234, 241 (1960). In his opinion reserving judgment in *Kinsella v. Krueger*, 351 U.S. 470 (1956), *overruled by Reid v. Covert*, 354 U.S. 1 (1957),

Justice Frankfurter stated that "the Constitution 'clearly distinguishes the military from the civil class as separate communities' and 'recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations...,' Winthrop, Military Law and Precedents (2d ed. 1896), 145." *Kinsella*, 351 U.S. at 481-482.

The Court of Appeals' decision has established a third class of citizens who are military for purposes of court-martial jurisdiction but civilian in all other respects. Article 2, Uniform Code of Military Justice, confers court-martial jurisdiction over those receiving pay or allowances and performing military duties. 10 U.S.C. § 802(c) (2000). By virtue of his pretrial confinement, Petitioner was no longer wearing military uniforms. Further, Petitioner had reached his EAS and thus his contractual obligation of service had ended.

At least as far back as *In re Walker*, 2 Am. Jurist 281 (Mass. 1830), servicemembers who committed crimes shortly before their EAS could be retained on active duty past their EAS for trial by court-martial. But, until the decision of the Court of Appeals, no court has ever held that military jurisdiction continues over citizens who wear no uniforms, receive no pay or allowances, perform no military duties, and have no enlistment contract. This perhaps explains the Court of Appeals' comparison of Petitioner to similarly situated federal civilian employees. *Fischer*, 61 M.J. at 419. "[W]e note that federal civilian employees may be suspended without pay upon indictment, regardless of whether there is pretrial confinement." *Id.*

The Court of Appeals decision has blurred the line between servicemembers and civilians. In fact, it is difficult

to establish any connection between Petitioner and the military after his EAS without the status-based determination that he was on active duty. But military jurisdiction, like military pay, is status based. *Fischer*, 61 M.J. at 423 (Erdmann, J. dissenting).

In holding that military pay is governed by contract principles of useful performance, rather than the status based nature of active duty, the Court of Appeals has created a new class of servicemembers who are not subject to pay or allowances but remain subject to court martial jurisdiction. The legality of the Court of Appeals' creation of this hybrid class of servicemembers is an important question of federal law that has not, but should be, decided by this Court. This Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

U.S. v. David E. FISCHER

No. 04-0756/MC.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

2005 CAAF LEXIS 1211

October 17, 2005, Decided

NOTICE: [*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: CCA 200200303. *United States v. Fischer, 2005 CAAF LEXIS 963 (C.A.A.F., Sept. 2, 2005)*

OPINION:

Appellant's petition for reconsideration of the Court's decision issued on September 2, 2005, denied.

APPENDIX B

UNITED STATES, Appellee v. David E. FISCHER, Lance Corporal, U.S. Marine Corps, Appellant

No. 04-0756

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

61 M.J. 415; 2005 CAAF LEXIS 963

May 3, 2005, Argued
September 2, 2005, Decided

SUBSEQUENT HISTORY: Reconsideration denied by *United States v. Fischer, 2005 CAAF LEXIS 1211 (C.A.A.F., Oct. 17, 2005)*

PRIOR HISTORY: Crim. App. No. 200200303. Military Judges: T.A. Daly and M. H. Sitler. *United States v. Fischer, 60 M.J. 650, 2004 CCA LEXIS 143 (N-M.C.C.A., 2004)*

COUNSEL: For Appellant: Lieutenant Brian L. Mizer, JAGC, USNR (argued).

For Appellee: Captain Glen R. Hines, USMC (argued); Colonel William K. Lietzau, USMC (on brief).

JUDGES: EFFRON, J., delivered the opinion of the Court, in which CRAWFORD and BAKER, JJ., joined. ERDMANN, J., filed a dissenting opinion, in which GIERKE, C.J., joined.

OPINIONBY: EFFRON

OPINION:

[*415] Judge EFFRON delivered the opinion of the Court.

At a general court-martial composed of a military judge sitting alone, Appellant was convicted, pursuant to his pleas, of two specifications of indecent acts with a child under the age of sixteen, in violation of Article 134, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 934 (2000)*. He was sentenced to a bad-conduct discharge, confinement for twelve months, and reduction to pay grade E-1. Pursuant to a pretrial agreement, the [*416] convening authority suspended all confinement in excess of 270 days. The United States Navy-Marine Corps Court of Criminal Appeals, sitting en banc, affirmed the findings and sentence. *United States v. Fischer, 60 M.J. 650* [**2] *(N-M. Ct. Crim. App. 2004)*.

On Appellant's petition, we granted review of the following issue:

> WHETHER APPELLANT WAS SUBJECTED TO ILLEGAL PRETRIAL PUNISHMENT AND DENIED DUE PROCESS OF LAW WHEN HIS PAY WAS STOPPED WHILE HE WAS IN PRETRIAL CONFINEMENT AFTER THE END OF HIS OBLIGATED SERVICE.

For the reasons set forth below, we affirm the decision of the Navy-Marine Corps Court of Criminal Appeals.

I. BACKGROUND

A. PRETRIAL AND TRIAL PROCEEDINGS

Under Appellant's enlistment contract, his period of obligated service ended on June 29, 2001. Eight weeks earlier, on May 4, Appellant was placed in pretrial confinement for various sexual offenses with minor females. In recommending pretrial confinement, Appellant's commander explained that he considered Appellant a flight risk because of his upcoming end of obligated service (EAS) date, June 29.

Appellant was still in pretrial confinement on June 29. Under applicable military pay regulations, discussed infra, the Government terminated his entitlement to military pay and allowances. On July 11, defense counsel notified the Depot Consolidated Administrative Center that Appellant's pay had been stopped. Initially, defense [**3] counsel was informed that Appellant's pay would be reinstated. Later, the Government advised defense counsel that Department of Defense (DoD) regulations prohibited reinstatement of Appellant's pay because he had reached his EAS date and was in pretrial confinement.

Appellant was convicted and sentenced on August 9, 2001. Appellant was paid for the period of pretrial confinement before his EAS, but he was not paid for the forty-one days of pretrial confinement that he served after his EAS. On appeal, Appellant argues that the termination of his pay amounted to illegal pretrial punishment in violation of Article 13, UCMJ, *10 U.S.C. § 813 (2000).*

B. PAY REGULATIONS

By statute, servicemembers who are on active duty are entitled to the basic pay of the pay grade to which they are assigned. *37 U.S.C. § 204(a)(1)*; see *Bell v. United States, 366 U.S. 393, 401, 6 L. Ed. 2d 365, 81 S. Ct. 1230 (1961)* (a soldier's entitlement to pay is statutory, not contractual). The Department of Defense Financial Management Regulations (DoD FMR) provide implementing rules concerning the obligation to pay servicemembers. See *Paalan v. United States, 51 Fed. Cl. 738, 745 (2002)*. [**4] In the course of determining that Appellant's pay could not be reinstated, the Depot Consolidated Administrative Center relied upon DoD FMR, vol. 7A, ch. 1, subpara. 010302.G.4 (2005), n1 which provides: "If a member is confined awaiting court-martial trial when the enlistment expires, pay and allowances end on the date the enlistment expires. If the member is acquitted when tried, pay and allowances accrue until discharge."

> n1 The Depot Consolidated Administrative Center cited DoD FMR, vol. 7A, ch. 3, subpara. 030207.D. This provision is identical to DoD subpara. 010302.G.4, the only difference being that subpara. 030207 appears in Chapter 3, which is entitled "Special Pays -- Officers Only" as opposed to Chapter 1, which is entitled "Basic Pay." Though subpara. 030207 was cited by the Depot Consolidated Administrative Center, Appellant's brief refers to subpara. 010302, and the Government's brief refers to subpara. 030207. For consistency, our discussion will cite to subpara. 010302, but the analysis would be no different for subpara. 030207.

[**5]

The regulation is consistent with decisions of the Comptroller General of the United States, n2 the United States Court of Federal [*417] Claims, and the United States Court of Appeals for the Federal Circuit. Well before

the enactment of the UCMJ, the Comptroller General determined that a soldier who reached EAS while in pretrial confinement, and who was later convicted, was not entitled to be paid subsequent to the EAS while in pretrial confinement. E.g., *Comptroller General McCarl to Maj. E. C. Morton, United States Army, 11 Comp. Gen. 342 (1932).* In a 1937 decision, the Comptroller General stated:

> An enlisted man of the Navy held for trial or for sentence by court martial after expiration of enlistment is being held to await the completion of criminal proceedings against him under authority of the Articles for the Government of the Navy. He is no more entitled to pay when so held after expiration of his enlistment than is a civilian who is being held for trial on a criminal offense by the civil authorities, and the fact that the issuance of his discharge is delayed pending the conclusion of the proceedings gives him no right to pay beyond the period for which [**6] he contracted to serve. The period of retention for criminal proceedings is no part of the enlistment contract and the obligation of the Government . . . is to pay him for the period for which he contracted to serve, not to pay him for any period he may be held on criminal charges after expiration of enlistment, any more than it would be obligated to pay him after his enlistment had expired if he were convicted and sentenced to imprisonment.

Acting Comptroller General Elliot to the Secretary of the Navy, 17 Comp. Gen. 103 (1937), 1937 U.S. Comp. Gen. LEXIS 271, at *6-*7 (1937).

n2 The Comptroller General is the head of the Government Accountability Office (GAO), formerly known as the General Accounting Office. See GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004). The GAO is an independent, nonpartisan agency in the legislative branch that reports to Congress on the activities of executive branch agencies. Frederick M. Kaiser, General Accounting Office and Comptroller General: A Brief Overview, in Major Studies and Issue Briefs of the Congressional Research Service (2000); Frederick C. Mosher, The GAO: The Quest for Accountability in American Government 2-3 (1979). A primary duty of the Comptroller General involves issuance of opinions on behalf of the legislative branch interpreting legislation and determining the legality of financial transactions. See Mosher, supra at 205-06.

[**7]

In 1951, shortly before the UCMJ took effect, the Comptroller General ruled that the pre- UCMJ prohibition against pretrial punishment n3 did not require payment of pretrial confinees held beyond their EAS date:

> The said provisions do not require any change in the rule that the pay and allowances of an enlisted person whose term of enlistment expires while he is in confinement, awaiting trial by court martial, terminate on the date of the expiration of his term of enlistment unless he is acquitted, in which event pay and allowances accrue until he is discharged.

Assistant Comptroller General Yates to the Secretary of the Army, 30 Comp. Gen. 449 (1951), 1951 U.S. Comp. Gen. LEXIS 86, at *6 (1951) [hereinafter Yates].

> n3 "Nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him." Article of War 16, Manual for Courts-Martial, U.S. Army (MCM) (1949 ed.), App. 1. "Nor shall any accused who is confined while awaiting trial be made subject to punishments or penalties other than confinement for any offense with which he stands charged prior to execution of an approved sentence on charges against him . . . and they will not forfeit pay or allowances during the period of confinement except pursuant to sentences ordered executed." MCM (1949 ed.), P 19a.

[**8]

In suits brought by pretrial confinees who reached their EAS while in pretrial confinement against the Government for pay and allowances for the time in pretrial confinement past their EAS, the United States Court of Federal Claims and its predecessor court have followed the reasoning of the Comptroller General's decisions, holding that "when an enlisted person is in confinement awaiting trial at the time his term of enlistment expires, his pay and allowances terminate on the date his enlistment expires unless he is subsequently acquitted." *Moses v. United States, 137 Ct. Cl. 374, 380 (1957)*; see also *Singleton v. United States, 54 Fed. Cl. 689, 692 (2002)*. But cf. *Rhoades v. United States, 668 F.2d 1213, 229 Ct. Cl. 282 (1982)*; *Dickenson v. United* [*418] *States, 163 Ct. Cl. 512 (1963)* (distinguishing the facts and holding that the Comptroller General's rule did not apply under the circumstances of the cases).

According to the United States Court of Appeals for the Federal Circuit, the authority for the military to hold an enlistee in service after EAS without pay pending court-martial unless there is an acquittal constitutes a "settled [**9] rule of law." *Simoy v. United States, 64 Fed. Appx. 745, 746 (Fed. Cir. 2003)*; see also *Anderson v. United States, 70 Fed. Appx. 572, 575 (Fed. Cir. 2003)*; *Dock v. United States, 46 F.3d 1083 (Fed. Cir. 1995)*.

C. ARTICLE 13

Appellant contends that DoD FMR 010302.G.4, which was the basis for terminating his pay after he reached his EAS while in pretrial confinement, violated the *Article 13, UCMJ*, right to be free from illegal pretrial punishment. *Article 13* provides: "No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him." We have interpreted *Article 13* to prohibit two types of activities: (1) the intentional imposition of punishment on an accused prior to trial, i.e., illegal pretrial punishment; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. See *United States v. Inong, 58 M.J. 460, 463 (C.A.A.F. 2003)*; *United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997)*.

Appellant focuses his argument on the illegal pretrial punishment [**10] prong of *Article 13*. A violation of this prong "entails a purpose or intent to punish an accused before guilt or innocence has been adjudicated." *McCarthy, 47 M.J. at 165*. We apply this standard by examining the intent of detention officials or by examining whether the purposes served by the restriction or condition are "reasonably related to a legitimate governmental objective." *United States v. King, 61 M.J. 225, 227 (C.A.A.F. 2005)* (citing *Bell v.*

Wolfish, 441 U.S. 520, 539, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979); McCarthy, 47 M.J. at 165).

The question of whether Appellant is entitled to credit for an Article 13 violation is reviewed de novo. *United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002)*. It is a mixed question of law and fact, and the military judge's findings of fact will not be overturned unless they are clearly erroneous. Id. Appellant bears the burden of proof to establish a violation of *Article 13*. Id.

II. DISCUSSION

Appellant does not dispute the lower court's finding that neither Appellant's jailors nor his chain of command intended to punish Appellant by stopping his pay. Instead, Appellant asks [**11] this Court to find that the termination of Appellant's pay, in accordance with DoD FMR 010302.G.4, amounted to illegal pretrial punishment because it operated as punishment imposed before trial.

A. REGULATORY PURPOSE

Appellant contends that the implicit purpose of DoD FMR 010302.G.4 is to punish. Appellant interprets DoD FMR 010302.G.4 as denying pay only to those who are guilty, citing the provision that those who are held in pretrial confinement past their EAS and later acquitted are reimbursed for the time held without pay. The Department of Defense regulations, however, are not so narrow.

A servicemember's pay is not terminated just because the servicemember is placed in pretrial confinement. DoD FMR 010302.F.1 states that pay and allowances accrue to members in military confinement unless: (a) confined by military authorities on behalf of civil authorities; (b) pay and allowances are forfeited by court-martial sentence; or (c) the term of enlistment expires. A servicemember who is confined

before trial is entitled to "receive pay until the end of his enlistment contract, regardless of the ultimate disposition of the case." *Paalan, 51 Fed. Cl. at 745.* If a pretrial [**12] confinee does not reach EAS until after the adjudication of the case, the pretrial confinee is entitled to pay and allowances for the time held in pretrial [*419] confinement, regardless of whether the individual was found guilty or not guilty.

Moreover, every servicemember's entitlement to pay is terminated at EAS. See *Simoy v. United States, 64 Fed. Appx. 745, 747 (Fed. Cir. 2003)* ("a service member's entitlement to pay ceases when his enlistment expires"); Matter of: *Courts-martial Sentences-Records Lost Before Appellate Review-Appellate Leave Benefits, 1996 U.S. Comp. Gen. LEXIS 442,* at *4-*5 (1996) ("It is a well settled rule that no credit for pay and allowances accrues to a court-martialed enlisted member during periods after the expiration of his term of enlistment . . . ."). Although Appellant characterizes the regulations as "terminating a serviceman's pay and allowances at the end of his enlistment if the serviceman is in pre-trial confinement," there is no distinction between a servicemember in pretrial confinement and one in any other status. All servicemembers lose their entitlement to pay and allowances upon expiration of their enlistment contract.

A servicemember [**13] may be paid after an enlistment expires in two situations. First, a servicemember who remains in the service and performs productive work may be paid. See *United States v. Shattuck, 1989 CMR LEXIS 187, at *5 (A.F.C.M.R. 1989)*; DoD FMR 010302.G.1. Standard confinement duties, however, are not considered active-duty work that would entitle a pretrial confinee held past EAS to payment. See DoD FMR 010302.G.1; *Combs v. United States, 50 Fed. Cl. 592, 594 n.2 (2001)*; *Shattuck, 1989 CMR LEXIS 187, at *5.* The second situation is the focus of

Appellant's concern. If a servicemember held in pretrial confinement past EAS is later acquitted, the servicemember is retroactively paid for the time spent in pretrial confinement past the EAS date. See DoD FMR 010302.G.4. Appellant assumes that because one group of pretrial confinees (the group that is later acquitted) is reimbursed, then the other group (the group that is later convicted) is being punished. This argument takes too limited a view of the regulations. Acquittal provides a rational, objective basis for reimbursement. The Government's policy of retroactively paying persons held [**14] past their EAS when a charge has not been sustained at trial does not signify an intent to punish the other group. In civilian criminal cases, for example, the Government may be liable for reasonable attorney's fees and litigation expenses to a prevailing defendant if the Government position was "vexatious, frivolous, or in bad faith." Hyde Amendment, Pub. L. No. 105-119, tit. VI, § 617, 111 Stat. 2440, 2519 (codified in statutory notes at *18 U.S.C. § 3006A (2000)*). Although more limited than the reimbursement provision of DoD FMR 010302.G.4, the Hyde Amendment reflects a policy to compensate specific individuals because of a flaw in their prosecution. It is not a policy designed to punish those who are not compensated. Likewise, we should not assume that the compensatory provisions of the military pay regulations reflect an implicit intent to punish an individual in Appellant's situation.

We note Appellant does not allege that he was held in pretrial confinement without due process. Appellant was placed in pretrial confinement in accordance with Rule for Courts-Martial 305, which contains specific standards and detailed requirements for notice and an opportunity [**15] to respond. Following the determination that he should be

held in pretrial confinement, Appellant's pay was terminated in accordance with a neutral criterion, his EAS.

Appellant does not claim before this Court that the termination of his pay violated the *Thirteenth Amendment's* prohibition against involuntary servitude or that there is a constitutional right to be paid while in pretrial confinement. In that regard, we note that federal civilian employees may be suspended without pay upon an indictment, regardless of whether there is pretrial confinement. See *5 U.S.C. § 7513(b) (2000).* As the Federal Circuit explained:

> An indictment . . . will, as a general rule, provide reasonable cause for an agency to believe that the employee has committed such a crime, and, when the nature of the crime alleged relates to the employee's ability to perform his or her duties, an agency may summarily suspend the employee, without pay, pending the outcome of the criminal proceedings.

[*420] *Richardson v. United States Customs Serv., 47 F.3d 415, 419 (Fed. Cir. 1995).* By contrast, the pay of military personnel is not terminated upon the filing or [**16] referral or charges, nor is it terminated upon pretrial confinement. The fact that pay is terminated only when pretrial confinement is combined with a neutral criterion, the expiration of the term of service, underscores the non-punitive nature of the policy. When the Government selects one among many available objective criteria for terminating pay, the fact that other criteria could have been used does not demonstrate that the selected point fails to serve a legitimate Government objective. Like the indictment date, the EAS date is a rational, objective point for termination of pay, and it is reasonably related to the legitimate Government

objective of not paying people who are not performing duties.

B. REGULATORY EFFECT

Appellant next argues that even if the regulation is not implicitly punitive, the policy is punitive in effect under the factors set out by the Supreme Court in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963)*. In Mendoza-Martinez, the Court set forth the following seven factors for use in determining whether an Act of Congress is punitive or regulatory in nature: (1) whether the sanction involves an affirmative disability or restraint; [**17] (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation promotes retribution and deterrence -- the traditional aims of punishment; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned. *372 U.S. at 168-69*; see *Fischer, 60 M.J. at 656-58* (Villemez, J., dissenting).

Our Court has not previously applied the Mendoza-Martinez factors in the context of conducting a review under *Article 13*. Assuming, without deciding, that the Mendoza-Martinez factors are applicable to *Article 13*, these factors do not support a finding that DoD FMR 010302.G.4 is punitive.

1. Affirmative Disability or Restraint

We first take into account whether DoD FMR 010302.G.4 imposes an affirmative disability or restraint. See *Mendoza-Martinez, 372 U.S. at 168*. DoD FMR 010302.G.4 provides for the termination of pay for an individual in Appellant's situation. Although termination [**18] of pay at

EAS could be viewed as a disability, it is difficult to characterize this as an affirmative disability because Appellant, and those in his position, are not entitled to be paid. See Yates; *Shattuck, 1989 CMR LEXIS 187, at *4-*5.*

2. Historic Perspective

The next factor considers the historical perspective on the consequence of the regulation. *Mendoza-Martinez, 372 U.S. at 168.* Appellant points out that "forfeiture of pay has long been regarded as punishment." In the present case, there has been no forfeiture of pay. Where Appellant was not entitled to payment, nothing could have been forfeited.

Also, while we do not give great weight to negative legislative history, we note that Congress has amended provisions of the UCMJ addressing military pay on several occasions, but has not disturbed the settled interpretation of the relationship between *Article 13* and termination of military pay upon EAS. See, e.g., Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983) (amending Article 57, UCMJ, *10 U.S.C. § 857*); National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, tit. XI, 110 Stat. 461-67 (1996) [**19] (amending *Article 57*, establishing Article 58b, *10 U.S.C. § 858b*); National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581-82, 1073(a)(9)-(11), 111 Stat. 1759, 1900 (1997) (amending *Article 58b*).

3. Scienter

As previously discussed, the pay of all servicemembers is terminated when they reach EAS. Consciousness of guilt is not a [*421] factor in determining whether to implement the regulation, so the regulation has no role in a finding of scienter.

4. Retribution and Deterrence

The fourth factor considers whether DoD FMR 010302.G.4 promotes the traditional aims of punishment -- retribution and deterrence. *Mendoza-Martinez, 372 U.S. at 168.* Appellant argues that "it is difficult to imagine a better form of retribution and deterrence." The policy, however, is not aimed at all who are accused of a crime and held in pretrial confinement, but only applies if a neutral event occurs -- the person's EAS date.

5. Application to Criminal Behavior

The fifth factor requires an evaluation as to whether the policy is invoked as a result of behavior that is already a crime. *Mendoza-Martinez, 372 U.S. at 168.* [**20] Appellant argues that this factor is met because the relevant FMR provisions would not have been triggered if there was no probable cause to believe Appellant violated the UCMJ. However, the behavior to which DoD FMR 010302.G applies is reaching the end of an enlistment contract, which is not a crime.

As noted above, a servicemember does not lose entitlement to pay by virtue of being in pretrial confinement. The deciding factor is whether the servicemember has reached EAS, not whether there is probable cause to believe the individual violated the UCMJ. See DoD FMR 010302.G.4.

6. Alternative Purpose

The sixth factor considers whether there is a non-punitive purpose to the regulation. *Mendoza-Martinez, 372 U.S. at 168-69.* Here, Appellant reiterates his argument that the stated purpose of the FMR is pretext, specifically noting that

DoD FMR 010302.G.4 returns pay and allowances to servicemembers in Appellant's position who are subsequently acquitted.

However, there is an alternative, non-punitive purpose of DoD FMR 010302.G.4. The alternative purpose is that a servicemember held in pretrial confinement who has passed EAS and who is not providing productive [**21] service is not entitled to pay and allowances. As discussed above, EAS is a neutral, non-punitive point in time which is reasonably related to the legitimate governmental interest in terminating the pay of persons who are not performing productive service.

7. Excessiveness

The final factor considers whether the regulation is excessive in relation to the alternative purpose assigned to it. *Mendoza-Martinez, 372 U.S. at 169*. Appellant argues that the FMR inflicts an excessive toll. We disagree. In civilian life, pretrial confinees may lose their jobs and are often not compensated for the time spent in pretrial confinement. The military's policy to reimburse pretrial confinees who were mistakenly held is more generous than the Hyde Amendment, discussed above, that applies in civilian criminal cases. Although Appellant may undergo personal financial loss because of the policy reflected in the regulations, the termination of pay upon the expiration of the enlistment contract does not signify that the policy is excessive.

III. CONCLUSION

As Appellant conceded, the brig authorities in this case had no intent to punish Appellant. The regulation is not implicitly [**22] punitive or punitive in effect. There is a legitimate, non-punitive reason behind the regulation. The

application of the policy was reasonable, given that Appellant reached his EAS and did not perform productive services. Under an Article 13 claim, we look to whether there was intent to punish or a punitive effect. If Appellant takes issue with the propriety of the underlying decisions as a matter of fiscal law, he must pursue that issue before the United States Court of Federal Claims.

As a final matter, Appellant also maintains that his *Fifth Amendment* rights were violated because he was punished by virtue of the application of DoD FMR 010302.G.4 without due process of law. In view of our conclusion that the regulation has a legitimate non-punitive [*422] purpose, there is no punishment at issue in this case. Moreover, as explained above, there was no forfeiture in this case because Appellant had no entitlement to pay and allowances.

IV. DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

DISSENTBY: ERDMANN

DISSENT:

ERDMANN, Judge, with whom GIERKE, Chief Judge, joins (dissenting):

The majority opinion finds that terminating the pay of a servicemember [**23] in pretrial confinement, whose term of service has been involuntarily extended by the Government, does not constitute illegal pretrial punishment under Article 13, Uniform Code of Military Justice (UCMJ), *10 U.S.C. § 813 (2000)*. I would hold that the regulation requiring the termination of pay under those circumstances is

punitive in effect and its application constitutes illegal pretrial punishment.

Fischer was placed in pretrial confinement on May 4, 2001. His enlistment expired on June 29, 2001. Rather than discharging him from military service at the end of his enlistment and thereby losing jurisdiction over him, the Marine Corps understandably extended his active duty status pending court-martial. n1 Fischer remained in confinement and his pay and allowances were terminated. When Fischer asked for his pay to be reinstated, the Government responded that it was prohibited from paying him under Department of Defense (DoD) regulations.

> n1 Rule for Courts-Martial 202(c)(1) provides that a servicemember whose enlistment has expired may be "held on active duty." Marine Corps Manual for Legal Administration § 1005 (31 Aug 99), details this involuntary extension of active duty and requires that proper administrative action be taken to effectuate the extension. While the record in this case contains references to the fact that Fischer's active duty was extended, it contains no references to the administrative action effectuating the extension.

[**24]

One of the basic guarantees under the *Due Process Clause* is that a pretrial detainee cannot be punished until there is a finding of guilt. *Bell v. Wolfish, 441 U.S. 520, 533, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979). Article 13 of the UCMJ*, which prohibits pretrial punishment, has its roots in this constitutional guarantee. Servicemembers who are accused of crimes can be placed in pretrial confinement to ensure that they will appear at trial and to prevent further misconduct. Rule for Courts-Martial (R.C.M.) 305(h)(2)(B). When placed in pretrial confinement, *Article 13* protects

them from conditions that constitute punishment, penalty or excess. In this case we are called on to determine whether terminating the pay and allowances of a servicemember, who is in pretrial confinement and whose enlistment has been involuntarily extended, constitutes punishment under *Article 13*.

The DoD regulation in question, the Department of Defense Financial Management Regulation (DoD FMR), vol. 7A, ch. 1, 010302.G.4 (May 2005), n2 provides:

4. Confined Awaiting Trial by Court-Martial. If a member is confined awaiting court-martial trial when the enlistment expires, pay and allowances end on the date the [**25] enlistment expires. If the member is acquitted when tried, pay and allowances accrue until discharge.

> n2 The May 2005 version of subpara. 010302.G.4 is identical to provisions that were in effect during Fischer's pretrial confinement. See Department of Defense Financial Management Regulation, vol. 7A, ch. 3, 030207.D (Feb. 2000).

The majority focuses on the fiscal implications of the regulation and relies, in part, on opinions of the Comptroller General and Court of Claims. While these opinions are interesting both from a fiscal and a historical perspective, they do not provide any binding authority for this court as they do not interpret *Article 13* or the cases from this court or the U.S. Supreme Court dealing with illegal pretrial punishment. Nor do those opinions consider the "status" based nature of court-martial jurisdiction under the UCMJ. It is the primary duty of this court to provide such interpretations.

I have no quarrel with the majority's finding that a servicemember's entitlement to [*423] pay is [**26] terminated when his or her enlistment expires. That, however, is simply not the situation in this case. One of the mandatory factors underlying court-martial jurisdiction is that the person to be tried must be subject to the UCMJ. In other words, the person must be in a "status" in which he or she is a "person[] . . . subject to" the UCMJ. See Article 2(a), UCMJ, *10 U.S.C. § 802(a) (2000)*. Article 3(a), UCMJ, *10 U.S.C. § 803(a) (2000)*, makes it clear that personal jurisdiction is "status based" under the UCMJ: ". . . a person who is in a status in which the person is subject to this chapter . . ." Emphasis added. Holding Fischer beyond his term of service continued his status as a "servicemember on active duty" through disposition of the charges against him. R.C.M. 202(c)(1).

As I read the majority opinion, once a servicemember's term of enlistment is involuntarily extended, the obligation to provide pay and allowances is extended as well except in the event that the servicemember is in pretrial confinement. The result of this view is that the Government can, solely for its own purposes, imprison a presumptively innocent [**27] individual, unilaterally continue military status with all its obligations and duties and at the same time take away one of the basic rights associated with active duty military status -- the right to pay. n3 I cannot join the majority's view that these circumstances do not constitute a violation of *Article 13*.

> n3 *37 U.S.C. § 204(a)(1) (2000)* provides that members of a uniformed service on active duty are entitled to pay.

As the majority notes, this court has not previously applied the criteria of *Kennedy v. Mendoza-Martinez, 372*

U.S. 144, 168, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963), in order to determine whether conditions of pretrial confinement violate *Article 13*. Were I to apply those factors, I would disagree with the conclusion reached by the majority that the regulation at issue is not punitive in effect. However, I do not believe that such an analysis is necessary. In my view, this court's Article 13 jurisprudence provides a proper framework for determining whether Fischer was subject to unlawful [**28] pretrial punishment.

Article 13 prohibits two types of activity: (1) the intentional imposition of punishment on an accused prior to trial; and (2) pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial. *United States v. Inong, 58 M.J. 460, 463 (C.A.A.F. 2003)*; *United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997)*. The first prong prohibits a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are "reasonably related to a legitimate governmental objective. . . ." *Bell, 441 U.S. at 539*; *McCarthy, 47 M.J. at 165*. The second prevents unduly rigorous circumstances during pretrial detention. Conditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment. Id.; *United States v. James, 28 M.J. 214, 216 (C.M.A. 1989)*. A determination of whether Fischer is entitled to relief for unlawful pretrial [**29] punishment involves independent, de novo review. *United States v. Smith, 53 M.J. 168, 170 (C.A.A.F. 2000)*; *McCarthy, 47 M.J. at 165*; see *Thompson v. Keohane, 516 U.S. 99, 113, 133 L. Ed. 2d 383, 116 S. Ct. 457 (1995)*.

Fischer's active duty military status was extended in virtually every respect save one -- he was no longer paid. The

sole reason that his pay was stopped, as opposed to other servicemembers extended on active duty, was that he was in pretrial confinement. Fischer was in pretrial confinement because both his Commanding Officer and the Initial Review Officer found that he constituted a flight risk and a threat to commit serious misconduct. I find no reasonable relation to a legitimate government objective served by terminating an active duty servicemember's pay and allowances because he or she is in pretrial confinement. Since Fischer's pay would not have been terminated except for the pretrial [*424] confinement, its effect on Fischer is obviously punitive.

The regulation's objective, as characterized by the majority, is that servicemembers held in pretrial confinement are not considered to be performing "active duty work" and therefore should not be entitled [**30] to pay. This logic breaks down, however, because a servicemember who is later acquitted has performed the same duties while in pretrial confinement and receives compensation. Servicemembers in pretrial confinement are not automatically excused from performing useful duties. Military appellate case law is replete with cases discussing various duties performed by pretrial confinees. See, e.g., *United States v. Nelson, 18 C.M.A. 177, 178-79, 39 C.M.R. 177, 178-79 (1969)*; *United States v. Palmiter, 20 M.J. 90, 94 (C.M.A. 1985)*; *United States v. Dvonch, 44 M.J. 531, 533 (A.F. Ct. Crim. App. 1996)*. Similarly, an active duty servicemember in pretrial confinement who has not been involuntarily extended performs those same duties and receives his or her pay and allowances.

Forfeiting pay traditionally has been regarded as a form of punishment in the military services. See generally *United States v. Stebbins, 61 M.J. , (11-18) 61 M.J. 366, 2005 CAAF LEXIS 923* (C.A.A.F. 2005). This regulation imposes a forfeiture upon a servicemember in the absence of any due

process or adjudication of guilt. The effect of this action as punishment is illustrated [**31] by how the forfeiture is linked to the results of trial. If a servicemember in Fischer's situation is acquitted, he or she is paid retroactively. n4 But if that person is convicted, there is no pay adjustment. While the initial termination of pay was based solely on Fischer's pretrial confinement status, the ultimate termination of his pay in this situation is based solely on a finding of guilt. This is punishment.

> n4 The majority's conclusion that this payment is akin to compensation for the accused when the charge has not been sustained at trial creates a dangerous precedent. An acquittal in a criminal action does not mean that the Government was wrong in bringing the charges, nor should an acquittal entitle an accused to compensation. It merely means that the court-martial did not find the accused guilty beyond a reasonable doubt.

The nexus between the permanent termination of pay and a finding of guilt raises an additional concern which I believe further highlights the unlawful nature of this deprivation. [**32] Congress has delegated to the President the authority to establish maximum punishments. Article 56, UCMJ, *10 U.S.C. § 856 (2000)*. Under the Rules for Courts-Martial, the President has directed that the only authorized punishment involving a loss of pay is a forfeiture of pay to be accrued. See R.C.M. 1003(b)(2) and discussion. Additionally, execution of any punishment to forfeit pay is effective and executed only after trial. See Article 57, UCMJ, *10 U.S.C. § 857 (2000)*. Tying the deprivation of Fischer's pay to his conviction creates a punishment beyond that authorized by the UCMJ and the Manual for Courts-Martial, United States (2002 ed.).

There is no legitimate governmental objective in DoD FMR 010302.G.4 that outweighs its clear punitive effect, and the regulation therefore constitutes illegal pretrial punishment in violation of *Article 13*. I would hold that the regulation is unenforceable and Fischer is entitled to his full pay and allowances for the period in question. I therefore dissent.

APPENDIX C

UNITED STATES v. David E. FISCHER, Lance Corporal (E-3), U.S. Marine Corps

NMCCA 200200303

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

60 M.J. 650; 2004 CCA LEXIS 143

June 30, 2004, Decided

SUBSEQUENT HISTORY: Motion granted by *United States v. Fischer, 60 M.J. 368, 2004 CAAF LEXIS 1072 (C.A.A.F., 2004)*
Review granted by *United States v. Fischer, 61 M.J. 13, 2005 CAAF LEXIS 155 (C.A.A.F., 2005)*
Affirmed by *United States v. Fischer, 2005 CAAF LEXIS 963 (C.A.A.F., Sept. 2, 2005)*

PRIOR HISTORY: [**1] Sentence adjudged 9 August 2001. Military Judge: M.H. Sitler. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Recruit Depot, Eastern Recruiting Region, Parris Island, SC.

DISPOSITION: The court concluded that the findings and sentence were correct in law and fact, and that no error

materially prejudicial to the substantial rights of the appellant was committed.

CORE TERMS: pretrial, confinement, regulation, military, enlistment, court-martial, servicemember, entitlement, questioned, active duty, prong, allowances, sentence, presumption of innocence, military service, duty, forfeiture, expiration, soldier, legitimate governmental, detainee, grade, punitive, convenience, stoppage, rigorous, arrest, senior, punish, appropriate relief

COUNSEL: CDR GEORGE REILLY, JAGC, USN, Appellate Defense Counsel.

Capt GLEN HINES, USMC, Appellate Government Counsel.

JUDGES: BEFORE THE COURT EN BANC. RITTER, Senior Judge, delivered the opinion of the Court in which DORMAN, Chief Judge, CARVER, Senior Judge, PRICE, Senior Judge, SUSZAN, Judge, and REDCLIFF, Judge, concur. VILLEMEZ, Judge, filed a dissenting opinion, with HARRIS, Judge, joining.

OPINIONBY: RITTER

OPINION: [*650] RITTER, Senior Judge:

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of two specifications of indecent acts with a child under the age of 16, in violation of Article 134, Uniform Code of Military Justice, *10 U.S.C. § 934*. The appellant was sentenced to a bad-conduct discharge, confinement for 12 months, and reduction to pay grade E-1.

We have carefully considered the record of trial, the appellant's single assignment of error, and the Government's response. We conclude [**2] that the findings and sentence are correct in law and fact, and that no error materially prejudicial to the substantial rights of the appellant was committed. *Arts. 59(a)* and *66(c), UCMJ.*

[*651] The appellant's pay was terminated pursuant to Department of Defense regulations upon the expiration of his enlistment while he was in pretrial confinement. *See* Department of Defense Financial Management Regulation (DODFMR), Volume 7A, PP 010302F1c, G3 and G4. n1 At trial, he asserted that he had a statutory right to military pay while in pretrial confinement, even after the expiration of his term of enlistment. *See 37 U.S.C. § 204(a)(1).* On appeal, the appellant contends that the military judge erred by applying this regulation, rather than the statute, in denying his motion for appropriate relief.

n1 Formerly PP 030206A3, 030207C, and 030207D.

Jurisdiction Regarding Entitlement to Pay

As a preliminary matter, the Government contends that this court lacks subject matter jurisdiction over [**3] military pay issues. We agree generally with that proposition, but find that we have jurisdiction to decide the underlying issue before us.

The jurisdiction of this court is narrowly proscribed by Congress. *See Arts. 62, 66, 69,* and *73, UCMJ; see also Clinton v. Goldsmith, 526 U.S. 529, 535, 143 L. Ed. 2d 720, 119 S. Ct. 1538 (1999)*(construing similar language in *Article 67(c)*, UCMJ, defining the jurisdiction of our superior court). At issue in this case is our authority under *Article 66(c)*, UCMJ, which provides in part:

> In any case reviewed by it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved.

Were the appellant making a specific request of this court to determine his entitlement to back pay under the administrative regulations, we would be without jurisdiction to act. *Cf. United States v. Webb, 53 M.J. 702, 703 (Army Ct.Crim.App. 2000)*(holding that a Court of Criminal Appeals does not [**4] have jurisdiction to adjudicate a claim for retired pay). However, the appellant's motion at trial claimed the stoppage of his pay constituted *unlawful pretrial punishment*. n2 Record at 70; Appellate Exhibit XXVII. On appeal, he claims that the military judge erred in denying his motion. Appellant's Brief of 9 Jun 2003 at 3. An evaluation of whether the stoppage of the appellant's pay violated *Article 13*, UCMJ, is properly within this court's subject matter jurisdiction. *See generally United States v. Anderson, 49 M.J. 575 (N.M.Ct.Crim.App. 1998)*(invalidating brig's procedure of placing all pretrial detainees facing more than five years confinement in maximum custody as a violation of *Article 13*, UCMJ).

> n2 In addition, the appellant asserted his period of unpaid pretrial confinement violated the *13th Amendment to the United States Constitution's* prohibition against involuntary servitude. The military judge correctly held that *13th Amendment* did not apply to military service. *See United States v. Allen, 31 M.J. 572, 635 (N.M.C.M.R. 1990); United States v.*

Shy, 10 M.J. 582 (A.C.M.R. 1980). The appellant has not advanced that argument on appeal.

[**5]

Illegal Pretrial Punishment

Whether a pretrial detainee suffered unlawful punishment is a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003), rev. denied 59 M.J. 32 (C.A.A.F. 2003)*. The burden of proof is on the appellant to show a violation of *Article 13, UCMJ. See United States v. Mosby, 56 M.J. 309, 310 (C.A.A.F. 2002). Article 13* prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. *See United States v. Inong, 58 M.J. 460, 463 (C.A.A.F. 2003)*.

The "punishment prong" of *Article 13* focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. *See Pryor, 57 M.J. at 825* (citing *United States v. McCarthy, 47 M.J. 162, 165* [*652] *(C.A.A.F. 1997))*. As a detainee's pay status is [**6] not a condition of the restraint, nor relevant to ensuring presence at trial, the appellant's claim only implicates the punishment prong of *Article 13*. To determine if the stoppage of the appellant's pay violated the punishment prong of *Article 13*, we must determine whether this pretrial action was intended to be punishment and whether it furthered a legitimate governmental objective. *See Anderson, 49 M.J. at 576; see generally Bell v. Wolfish, 441 U.S. 520, 538-39, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979)*.

1. There was no intent to punish the appellant.

We find that the military judge's findings of fact on this issue are fully supported by the record, and adopt those findings here. Record at 89; Appellate Exhibit XXXVI. The record is clear, from the appellant's own evidence submitted in support of the motion, that there was no punitive intent behind the stoppage of his pay. To the contrary, when the trial defense counsel first inquired of brig staff about the status of the appellant's pay, the staff indicated that the appellant should have been receiving pay, and that it would be restarted. Only after researching the applicable regulations did the staff inform the trial defense [**7] counsel that the appellant could not be paid. We agree with the military judge that the local authorities were merely carrying out the regulation, and not attempting to punish the appellant.

2. The regulation does not operate as punishment.

We then turn to the question of whether the DODFMR provisions at issue further a legitimate governmental interest. Three subparagraphs of P 010302 of the DODFMR operate to deny pay to service members in the appellant's situation:

> 010302. Unauthorized Absence and Other Lost Time
>
> . . . .
>
> F. Military Confinement
>
> 1. General. Pay and allowances accrue to a member in military confinement except when:
>
> . . . .

> c. The term of enlistment expires. See subparagraph 010302.G below.
>
> G. Term of Enlistment Expires
>
> . . . .
>
> 3. Enlistment Expires Before Trial. An enlisted member retained in the Military Service for the purpose of trial by court-martial is not entitled to pay for any period after expiration of the enlistment unless acquitted or the charges are dismissed, or the member is retained in or restored to a full-duty status.
>
> 4. Confined Awaiting Trial by Court-Martial. If [**8] a member is confined awaiting court-martial trial when the enlistment expires, pay and allowances end on the date the enlistment expires. If the member is acquitted when tried, pay and allowances accrue until discharge.

By statute, service members on active duty are entitled to the basic pay at the pay grade to which they are assigned. *See 37 U.S.C. § 204(a)(1).* As the appellant correctly points out, nothing in the statute expressly prohibits a service member who has been extended involuntarily to secure court-martial jurisdiction from receiving basic pay. *See Paalan v. United States, 51 Fed. Cl. 738, 744-745 (2002).* However, regulations may supplant the military's liability to pay active-duty service members in certain situations, such as pretrial confinement. *Id.* (citing *Dock v. United States, 46 F.3d 1083, 1091-92 (Fed. Cir. 1995)).* Whether the statute "trumps" the regulation, or the regulation is an authorized implementation of statutory authority, is a question outside

the proper purview of this court. The appellant may seek relief on this basis, if he chooses, from the Board for Correction of Naval Records under [**9] *10 U.S.C. § 1552*, and, if he deems necessary, from the United States Court of Federal Claims under the Tucker Act, *28 U.S.C. § 1491*, or a United States District Court under the Little Tucker Act, *28 U.S.C. § 1346(a)(2). See Keys v. Cole, 31 M.J. 228, 234 (C.M.A. 1990); United States v. Webb, 53 M.J. at 704.*

For our purposes, it is sufficient to evaluate the **purpose** of the applicable DODFMR [*653] provisions, which is evident from the text and the overall goal of P 010302. The military, like any other executive branch agency, has a duty to spend its financial resources wisely. This regulation denies payment to those service members who do not continue to serve in a **full duty** status and provide productive service in furtherance of the military mission, whether it is because they have commenced an unauthorized absence, incapacitated themselves as a result of certain diseases, or are being held in pretrial confinement past the end of their active obligated service pending trial by court-martial. We find this to be a legitimate governmental interest, not punitive in nature, and [**10] that the military judge properly denied the appellant's motion for appropriate relief under *Article 13, UCMJ*. The appellant's assignment of error is without merit.

Conclusion

We therefore affirm the findings and sentence, as approved by the convening authority.

CHIEF JUDGE DORMAN, Senior Judge CARVER, Senior Judge PRICE, Judge SUSZAN, and Judge REDCLIFF concur.

DISSENTBY: Villemez

DISSENT: VILLEMEZ, Judge (dissenting):

> Numerius, the governor of Narbonensis, was on trial before the Emperor [Julian], and contrary to the usage in criminal cases, the trial was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?" Rerum Gestarum, L.XVIII, c.1.

Coffin v. United States, 156 U.S. 432, 455, 39 L. Ed. 481, 15 S. Ct. 394 (1895).

This case and its proper judicial resolution revolve around three seemingly simple, fundamental [**11] concepts and principles: the jurisdiction of this court to consider the appellant's plea of error, the appellant's military status, and--most basic of all to our criminal justice system in this country, both in and out of the military services--the almost-sacred principle of the presumption of innocence. I respectfully disagree with the way the majority of this court has chosen to apply these concepts to the facts and circumstances of this case. I believe that the appellant is entitled to appropriate relief, because the termination of his statutorily-based military pay, merely because he was in **pretrial** confinement beyond his original "term of enlistment" upon the expiration of his tour of active service (EAS), violates *Article 13, UCMJ*, which prohibits the

pretrial "*punishment* or *penalty* other than arrest or confinement . . . ." (Emphasis added).

Jurisdiction

Under the duties and responsibilities given us by *Article 66(c)*, UCMJ, this court may only "affirm such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." In *Burns v. Wilson, 346 U.S. 137, 142, 97 L. Ed. 1508, 73 S. Ct. 1045 (1953)*, [**12] the Supreme Court states: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from the violation of his constitutional rights." While in *United States v. Tardif, 57 M.J. 219, 223 (C.A.A.F. 2002)*, our senior court concludes: "Our Court has consistently recognized the broad power of the Courts of Criminal Appeals to protect an accused. We have consistently recognized that the charter of Courts of Criminal Appeals on sentence review is to 'do justice.'" (Internal citations omitted). Thus, as the Supreme Court observes in *Estep v. United States, 327 U.S. 114, 120, 90 L. Ed. 567, 66 S. Ct. 423 (1946)*: "Judicial review may indeed be required by the Constitution." (Citation omitted).

In *Ex parte Young, 209 U.S. 123, 143, 52 L. Ed. 714, 28 S. Ct. 441 (1908)*(quoting *Cohens v. Virginia, 19 U.S. 264, 6 Wheat, 264, 404, 5 L. Ed. 257 (1821)*, the Supreme Court reasons:

> "It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the [*654] legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass [**13] it by because it is doubtful. With

> whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."

See also Dombrowski v. Pfister, 380 U.S. 479, 483-84, 14 L. Ed. 2d 22, 85 S. Ct. 1116 (1965).

The majority opinion in this case correctly establishes the jurisdiction of this court to review and rule on the trial judge's denial of the appellant's court-martial motion claiming the stoppage of his pay constituted *unlawful punishment* applied pretrial, in violation of *Article 13, UCMJ*. I disagree, however, with the general conclusion reached in the majority opinion that it is beyond this court's proper purview to determine whether the statute establishing a servicemember's pay "trumps" the Department of Defense Financial Management Regulation (DODFMR) at Volume 7a, P 030207, or if that DODRMR provision cutting [**14] off the pay of a post-EAS pretrial confinee is an authorized implementation of statutory authority. I do not believe that answering that statutory-construction question is necessary *per se* in this case, because the clear effect of the questioned DODFMR provision is the creation, pretrial, of an *illegal* or, at the very least, an *improper punishment* condition. If in different circumstances the resolution of that question becomes necessary in determining whether an appellant had been subjected to an action with adverse constitutional-rights implications, this court does have the authority to make that

determination, simply in the context of remedying the adverse impact on an appellant. n1 Such is not the case herein, however, as the questioned DODFMR provision implodes under the excessive weight of its own internal illogicalness.

> n1 In regards to the issue or potential issue of "the interplay between pay mandating (or limiting) statutes and pay administrating regulations," the appellant notes and develops the point that when Congress grew concerned about some military members continuing to receive active duty pay and allowances while serving extended periods of post-trial confinement, statutory action and not mere regulatory action was taken to effect a change. Appellant's Brief of 9 Jun 2003 at 8-10.

[**15]

Military Status

There is no issue with a servicemember being retained beyond his or her EAS for the purpose of facing a court-martial for an offense or offenses alleged to have occurred before the expiration of his or her active-duty enlistment period. n2 To borrow a phrase, when done correctly it is an "altogether fitting and proper" procedure by which to ensure the integrity of the military justice system. What "legally" happens when this is done is that the suspected or accused servicemember is *involuntarily extended* on active duty, never actually being permitted to separate or leave active-duty, despite the passing of his EAS or contractual end-of-enlistment date. This is a permissible action, because enlistment in the military--while a contract--is much more in context and effect than a normal commercial contract. It creates a ***status*** that is not affected by a breach of that contract.

n2 For guidance on extending a servicemember beyond his or her EAS, *see* MILPERSMAN, art. 1160-050. *See also* Department of Defense (DOD) Directive 5154.29: DOD Pay and Allowances Policy and Procedures; and DOD Financial Management Regulation, DOD 7000.14-R, Volume 7A, Military Pay Policy and Procedures - Active Duty and Reserve Pay.

[**16]

The Supreme Court long ago established the principle that entry into military service effects a definite and discernible change of status, when it concluded:

> Enlistment is a contract; but it is one of those contracts which changes the status; and, where, that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes.
>
> . . . .
>
> By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new [*655] status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged.

In re Grimley, 137 U.S. 147, 151-52, 34 L. Ed. 636, 11 S. Ct. 54 (1890). Just as clearly established is the principle that the military status of a servicemember does not terminate by the mere appearance of a specific date on the calendar, and it certainly does not end automatically at a servicemember's EAS.

Thus, the individual, despite the passing of his or her original "contractual" discharge date, remains on active duty and subject to *in personam* jurisdiction, until properly separated. Providing guidance on this issue, our senior [**17] court in *United States v. Melanson, 53 M.J. 1, 2 (C.A.A.F. 2000)*, held that military jurisdiction terminates *only* upon the delivery of a valid discharge certificate, a final accounting of pay, and completion of the clearing process required under the appropriate service regulations to separate one from the military service. n3 The Court of Appeals for the Armed Forces, then the Court of Military Appeals, in *United States v. Poole, 30 M.J. 149, 151 (C.M.A. 1990)* stated:

> Despite any prior intimation to the contrary, . . . we now hold that jurisdiction to court-martial a servicemember exists despite delay -- even unreasonable delay -- by the Government in discharging that person at the end of an enlistment and that no "constructive discharge" results when a servicemember is retained on duty beyond the end of an enlistment.

(Internal citation omitted). *See also United States v. Williams, 53 M.J. 316, 317 (C.A.A.F. 2000); United States v. King, 42 M.J. 79, 80 (C.A.A.F. 1995); United States v. Batchelder, 41 M.J. 337 (C.A.A.F. 1994); United States v. King, 27 M.J. 327, 329 (C.M.A. 1989);* [**18] *United States v. Howard, 20 M.J. 353 (C.M.A. 1985); United States v. Wheeley, 6 M.J. 220 (C.M.A. 1979).*

> n3 A DD 214 is an individual's discharge certification, and the most common type of proof of military service. It has been issued to veterans discharged from all branches of the military service since 1950. In addition to personal information, such

> as one's name, social security number, and date of birth, it includes all relevant service dates, such as entry and separation dates. Among other things, it also lists net active service time, branch of service, type of discharge received, and any time lost due, for instance, to periods of unauthorized absence. *See http://www.valaro.com/lgy/coe/id49_m.htm.*

In the case of *Dickenson v. Davis, 245 F.2d 317, 319 (10th Cir. 1957), cert. denied, 355 U.S. 918, 2 L. Ed. 2d 278, 78 S. Ct. 349 (1958)*, the U.S. Court of Appeals for the Tenth Circuit states: "Service in the military, whether by enlistment or otherwise, creates a status [**19] which is not and cannot be severed by breach of contract unfortified by a proper authoritative action." Thus, the question is whether in this case, the "breach of contract" has been fortified, or not, "by a proper authoritative action." *Id.*

Entitlement to Pay

In his Brief, the appellant does an excellent job in establishing and explaining the statutory basis for a servicemember's entitlement to pay. All of which basically boils down to the fact that a servicemember is entitled to a base pay calculated on his or her pay grade and time in service. With certain well-established exceptions--such as the withholding of forfeitures properly awarded at a disciplinary proceeding--the individual continues to be so entitled to his or her pay *until properly discharged*, as noted above, and that is based solely on his or her status as an active-duty servicemember, not on the type or quality of his or her actual performance of duty.

In *Bell v. United States, 366 U.S. 393, 401-02, 6 L. Ed. 2d 365, 81 S. Ct. 1230 (1961)*, the Supreme Court states:

> A soldier's entitlement to pay is dependent upon statutory right. In the Armed Force, as everywhere else, there are good men and rascals, courageous [**20] men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future but not of accrued pay. But a soldier who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade [*656] and status, however ignoble a soldier he may be.

(Footnotes omitted). In *Bell*, the Supreme Court quotes affirmatively from an almost-100-year-old opinion of the Attorney General:

> "In the naval, as in the military service, the right to compensation does not depend upon, nor is it controlled by, 'general principles of law'; [sic] it rests upon, and is governed by, certain statutory provisions or regulations made in pursuance thereof, which specially apply to such service. These fix the pay to which officers and men belonging to the Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they *actually* perform service or not, unless their right thereto is forfeited or lost in some one of the modes prescribed [**21] in the provisions or regulations adverted to." *15 Op. Atty. Gen. 175, 176.*

Bell v. United States, 366 U.S. at 403-04. The "modes prescribed in the provisions or regulations" referred to above as proper and legitimate methods to take away a servicemember's entitled pay seem to be such things as the withholding of pay forfeited by a court-martial sentence, or pay for days during which the individual was absent without proper authority from his or her unit. n4 That the post-EAS-pay regulation might be included in that group will be addressed below.

> n4 *See generally Bell v. United States, 366 U.S. 393, 6 L. Ed. 2d 365, 81 S. Ct. 1230 (1961); Cowden v. United States, 600 F.2d 1354, 220 Ct. Cl. 490 (1979); Dickenson v. United States, 163 Ct. Cl. 512 (1963)*; and *Walsh v. United States, 43 Ct. Cl. 225 (1908).*

Post-EAS-Entitlement to Pay

In *Dickenson v. United States, 163 Ct. Cl. 512, 519 (1963)*, the Court of Claims found that: "In the absence [**22] of the issuance of a discharge to the plaintiff by the Army, his status as a soldier was not affected in any way by the expiration of the term of his enlistment . . . ." That court went on to conclude that the servicemember's entitlement to the statutory pay and allowances of his grade and status "*continues even though he is placed in arrest or confinement for trial on court-martial charges.*" *Id. at 520-21* (emphasis added). The pivotal point for the court--the lynchpin of its decision--was the fact that the plaintiff was held in the military service beyond his EAS for the *convenience of the Government*, which, thus, entitled him to his pay, despite the expiration of his contracted enlistment. *Id. at 514.*

In this case, almost by definition, the appellant also was extended on active duty for the convenience of the Government; for I do not believe anyone would argue it was

for the appellant's *convenience*. Likewise, there is no debate that the appellant, when extended on active duty to face disciplinary action, continued to be entitled to his statutory-based pay, as determined by his pay grade and number of years of service in the Marine Corps. [**23] The only real issue is whether the passing of the appellant's now-eviscerated EAS date served to legitimately end his total pay entitlement, solely due to his residence in pretrial confinement. The majority concludes with a "Yes," while I reason "**NO**" to be the correct answer.

Prohibited Pretrial Punishment

Article 13, UCMJ:

> No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

The confiscation of the appellant's entire pay entitlement, due solely to his post-EAS pretrial confinement, violates the provisions of *Article 13, UCMJ*, **both** as an improper *punishment* and as an improper *penalty*, which is defined as a "punishment imposed on a wrongdoer, especially in the form of imprisonment or fine." n5

> n5 BLACK'S LAW DICTIONARY 1153 (7th ed. 1999).

[**24]

[*657] The majority opinion focuses on its conclusion that only one of the two prongs of the illegal pretrial

punishment prohibition of *Article 13*--the "punishment" prong--applies in this case. Before addressing that prong, I wonder why it cannot additionally be argued that the second prong, as it relates to pretrial confinement conditions that are more rigorous than necessary to ensure an accused's presence at trial, is applicable to this case as well? Certainly taking away all of a pretrial confinee's pay is a condition more rigorous than necessary to ensure his or her presence at trial. Is not locking up the individual sufficient to ensure presence at trial, for money would only aid in his possible absence from trial if he were free to move about as desired?

Addressing the perhaps more cogent aspect of the issue, the majority opinion looks at the "punishment prong" of the *Article 13* prohibition too literally and technically. Perhaps, as Albert Einstein said: "This is too difficult for a mathematician. It takes a philosopher." n6 As the Court of Claims reasons in *Cowden v. United States, 220 Ct. Cl. 490, 499, 600 F.2d 1354, 1359 (1979)*: "Retention without pay is a kind [**25] of punishment. Such was not the intent of Congress in enacting the military pay statutes or the Uniform Code of Military Justice."

> n6 Professor Einstein was referring to the preparation of his income tax return. *See* Albert Einstein, Fort Liberty: *Using the First Amendment to Protect the Second* (visited 22 Jun 2004) < http://www.fortliberty.org/quotes/quotes-taxes.shtml>.

The majority opinion in this case centers on the vanilla intent of the brig personnel and local authorities in merely carrying out the mandate of the relevant regulation in cutting off the appellant's pay at his EAS, solely due to his being held in pretrial confinement. The string, however, must further be pulled. The just-following-orders explanation is but a deflection, not a "defense," in this case, as the

Government is the Government. If the trail leads back to an unconstitutional effect resulting from the implementation of the questioned regulation, such must surely override the purest of intentions.

The majority opinion narrows the consideration to the "punishment prong" of *Article 13, UCMJ*, and, to support [**26] its conclusion that there was no requisite intent to punish the appellant, affirmatively cites both *Bell v. Wolfish, 441 U.S. 520, 60 L. Ed. 2d 447, 99 S. Ct. 1861 (1979)* and *United States v. Anderson, 49 M.J. 575 (N.M.Ct.Crim.App. 1998)*, concluding both that in the appellant's case there was no specific intent by local authorities to punish the appellant and that the questioned regulation serves to further a legitimate governmental interest. Concerning the first aspect, the majority opinion holds that the local authorities were merely carrying out the regulation, with no personal intent to "punish" the appellant. Regarding the latter factor, the majority opinion finds that, as a pretrial confinee past his EAS, the appellant was not serving in the "full-duty status" required by the regulation for one past his or her original EAS to be continued to be entitled to his or her statutorily-based pay.

As mentioned, the majority opinion herein looks to this court's prior opinion in *Anderson* for guidance in considering the issue of pretrial punishment. I would urge a closer reading of *Anderson*, especially footnote 2 at page 577, where this court, in considering the "intent" factor, [**27] states: "Although we don't suggest that this was the intention of the policy, we are also concerned about the policy's coercive effect on pretrial confinees. It places considerable pressure on them . . . ."

Additionally, as also mentioned above, the majority opinion cites *Bell v. Wolfish*. In that case, the Supreme Court concludes:

> Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees. n7

[*658] *Bell, 441 U.S. at 539*, (internal citation and footnote omitted). *See also United States v. McCarthy, 47 M.J. 162, 165 (C.A.A.F. 1997)* and *United States v. James, 28 M.J. 214 (C.M.A. 1989)*.

> n7 "Qua: in the capacity of . . . ." BLACK'S LAW DICTIONARY 1252 (7th ed. 1999).

[**28]

In providing this guidance, in *Bell, 441 U.S. at 537*, the Supreme Court was borrowing from its prior decision in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963)*, where the Court had previously reasoned:

> The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult

> and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, [**29] these factors must be considered in relation to the statute on its face. Here, although we are convinced that application of these criteria to the face of the statutes supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive.

(Internal citations and footnotes omitted).

When we consider the facts of this case alongside these criteria, we may only conclude that the effect of the no-post-EAS-pay-for-pretrial-detainees regulation is clearly *pretrial punishment* and a violation of basic due process. First, the forfeiture of one's entire pay and allowances is and "has traditionally been regarded as a punishment." Second, it is automatic at the arrival of the pretrial detainee's original EAS, a date already neutered by the individual having been

involuntarily extended on active duty for the convenience of the Government, so that he or she might be processed for disciplinary action. Thus, it is automatic, taking effect prior to any guilt-determinative judicial action, and not coming [**30] "into play only on a finding of *scienter*." Third, the deprivation of income due to an artificial status being placed on a pretrial detainee does not "promote the traditional aims of punishment - retribution and deterrence." Fourth, the "behavior to which it applies"--merely being in pretrial confinement after one's now-meaningless EAS--is not "already a crime." Fifth, there is no "alternative purpose to which it may rationally be connected . . . ." *Kennedy, 372 U.S. at 168-69*. And, if I may be so very presumptuous as to offer a sixth factor: It just does not appear to be "fundamentally fair."

Presumption of Innocence

In tracing the history of the principle of the "presumption of innocence," in *Coffin v. United States, 156 U.S. 432, 453-56, 39 L. Ed. 481, 15 S. Ct. 394 (1895)*, the Supreme Court offers, as the starting point for its lengthy historical review of the principle: "Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens." *Id. at 454*. In focusing on this country's application of the concept, the Court states: "The principle that there [**31] is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Id. at 453*.

Thus, the "presumption of innocence" is such an accepted and basic principle in our judicial system in this country that little needs to be said about it as it applies to this case, except to offer a clarification of the Supreme Court's pronouncement

concerning the concept in *Bell*, which has been affirmatively cited by both the majority opinion in [*659] this case and in this dissent above. In *Bell*, the Court, after reviewing the questioned physical conditions involved in a particular, challenged pretrial confinement circumstance, which had been attacked, in part, as a violation of the presumption of innocence, concludes that the principle "has no application to a determination of a pretrial detainee during confinement before his trial has even begun." *Bell, 441 U.S. at 533.*

The nature of the due-process violation is decidedly different in this case, to the point that, I believe, the presumption of innocence does have an "application" to this case [**32] and the adverse affects on the appellant of the questioned, pay-depriving regulation. In *Bell*, physical conditions of the questioned pretrial confinement were being challenged. As noted above, the Court held that the issue is whether the challenged condition of pretrial confinement was, in fact, punishment--and, thus, improper--or whether it is "reasonably related to a legitimate governmental objective . . . ." *Id. at 539.* In this case, we are not considering a physical condition of the appellant's pretrial confinement, such as the sleeping arrangements of detainees, which was the genesis of the challenge in *Bell*, along with other conditions of confinement and management practices. In this case, we are examining the validity of the adverse impact of a condition separate from, but superimposed on the appellant's pretrial confinement, to the extent that it becomes improper "punishment" in violation of *Article 13, UCMJ*, in that it is not "reasonably related to a legitimate governmental objective." *Id.*

Legitimate Governmental Objective

To completely cut off one's statutory pay entitlement, due solely to being in pretrial confinement, after the individual's

[**33] now-rendered-meaningless original EAS, serves no legitimate governmental objective. To say that the individual is no longer in the "full-duty" status required by the questioned regulation to entitle one to his or her statutory pay and allowances, because a now-meaningless date passes, is artificial and appears to be without sound logic. As discussed above, the pretrial detainee's original EAS is meaningless, because the Government, for **its** convenience, **involuntarily** extended him or her on active duty--thus rendering his EAS date a nullity--for the purpose of facing disciplinary proceedings. No one debates the continued entitlement of the individual to his or her statutory pay after being so extended on active duty. No one even questions the individual's continued pay entitlement after being placed in pretrial confinement. However, all supposedly changes when the individual's now-meaningless EAS pops up on the calendar.

I believe this to be a problem, because: (a) there is no meaningful change in the individual's *status* at his or her original EAS, and (b) he or she is being hit with improper disparate--and perhaps harsh--treatment for no valid reason. The individual, [**34] extended on active duty past his or her original, now-meaningless EAS date, is in the location and "fully" performing the "duty" assigned to him or her, which are exactly the same as the day before, when he or she was still entitled to pay. Additionally, the now-pay-deprived individual is in the same place doing the same duties as the still-being-paid pre-EAS pretrial detainee in the next cell. And the logic and justification for this disparate treatment is what? And the real difference between the two? Perhaps it lies in one being "smarter" then the other, in that he or she had the "foresight" to commit his or her alleged offense earlier in his or her enlistment?

Improper Adverse Consequences

Before ending this consideration with a list of adverse consequences that render this questioned regulation a violation of the appellant's due-process rights, the counterpoint is made that a civilian does not get paid by the state for being in pretrial confinement. While that is a true statement as far as it goes, it does not apply to the facts of this case. For a servicemember the Government is his or her employer. If a salaried civilian employee is placed in pretrial confinement, he [**35] or she is entitled to a bail hearing and normally *would* continue to receive his or her salary, until actually fired for an inability to come to work. For a servicemember in the appellant's circumstances, the "firing" and end of employment--and logical end of one's [*660] pay entitlement--comes only with the awarding of a punitive discharge at the *conclusion* of the court-martial proceedings.

The following adverse consequences of the questioned pay-depriving regulation render it an improper pretrial punishment in violation of *Article 13, UCMJ*, and a violation of the appellant's right to the due process of law:

> -- The questioned regulation is arbitrary and capricious, in that it artificially and automatically imposes a total forfeiture of statutorily-based pay and allowances, without any meaningful change in status; and as such, it is not reasonably-related to a legitimate governmental objective; forfeitures may only be imposed as part of a legitimately awarded sentence;
>
> -- It violates the basic principle of the presumption of innocence, and is not "saved" by the provision that returns all of the pretrial money so withheld upon an acquittal at court-martial; as likely hardship [**36] created by this

artificially-imposed forfeiture of all pay and allowances may not be capable of repair, such as: adverse consequences and hardships for the appellant's family, the repossession of the appellant's property for inability to meet payment schedules; inability to hire, if desired, civilian counsel for court-martial representation; n8

-- The potential to place improper pressure on the appellant to plead guilty and accept a pretrial agreement, in order to sooner extricate himself from a no-pay situation; and

-- By removing the potential punishment of forfeitures at the appellant's court-martial, increasing the likelihood that more confinement might be awarded to "compensate" for the inability to award forfeitures.

n8 While representation by a civilian defense counsel is not a guaranteed right, it is an important personal option that does much to protect the integrity of the military justice system in the eyes of the general public.

For all these reasons and those discussed above, the questioned [**37] regulation must implode from the excess weight of its own illogicalness. While its intent might be admirable--saving the Government money--its effect is to impose an impermissible form of pretrial punishment or penalty on the appellant, in violation of *Article 13, UCMJ.* Thus, the appellant is entitled to appropriate relief, since the impressing of seaman fell out of favor in this country some time ago.

Judge HARRIS concurs.